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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

DEC - 9 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

)
)

CC Docket No. 02-278
CC Docket No. 92-90

COMMENTS OF AMERIQUEST MORTGAGE COMPANY

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SUMMARY

Ameriquet, a retail specialty mortgage lender that provides financial services to individuals who have less than perfect credit, relies on telemarketing outreach for a large percentage of its business. Absent the company's telemarketing outreach efforts, many of its customers would not be made aware of the refinancing and consolidation services that Ameriquet makes available to individuals who may have been denied credit through conventional mortgage channels.

The telemarketing practices of the retail specialty mortgage industry, and Ameriquet in particular, provide considerable consumer protections that obviate the need for a national do-not-call list for these types of transactions. Most notably, these mortgage transactions are typically completed in a face-to-face closing rather than over the telephone and are regulated by a myriad of state and federal lending regulations. For example, federal law requires a three-day cancellation period; however, Ameriquet provides customers with a seven day period. These type of face-to-face calls are inherently local in nature and involve affirmative steps by the consumer to proceed with and complete the transaction. Additionally, Ameriquet's use of sophisticated databases

and trained loan officers to target and customize its outreach efforts have resulted in historically low complaint levels.

Ameriquest is opposed to a national do-not-call list in general. In addition to not being necessary, such a list is unconstitutional under the *Central Hudson* standard. *Central Hudson* provides First Amendment protection for commercial speech that is lawful and not misleading. Because a national do-not-call list would limit all telemarketing calls - and not just those that are unlawful and misleading - a national list must directly advance a substantial government interest without being more extensive than necessary to advance that interest.

Outbound telemarketing generates over \$200 billion a year in sales. If consumers truly did not want to receive marketing calls, they would not buy such a high level of goods and services. The overall number and percentage of complaints about telemarketing is far too small to support the enactment of a privacy regulation as burdensome as the one being considered by the Commission. This is particularly true of face-to-face telemarketing calls, thereby justifying their exemption from any national Do Not Call list.

Furthermore, because the TCPA only reaches telephone solicitations by for-profit entities, a national do-not-call list will simply not advance the government's interest. There are a tremendous number of calls that will not be covered by such a list. Because calls from nonprofit entities are excluded from the TCPA's reach, one type of call is favored over another - a situation that cannot withstand Constitutional scrutiny. Finally, a national list is overly broad in that there are many other methods to limit calls and preserve consumer choice.

Nonetheless, if the Commission chooses to adopt a national do-not-call list, it should be done in place of any list that the Federal Trade Commission creates and it should preempt all state requirements. To do less would impose too many different requirements on marketers. Additionally, should the Commission adopt a national do-not-call list, it should include an exemption for local calls. Specifically, the Commission should exempt calls in which the transaction is closed in a face-to-face meeting.

Congress recognized that calls from local businesses are different than calls made by companies from a central location because there is no tie to the community. Ameriquest and other local businesses must carefully weigh the benefits of making calls and balance the possibility that they may alienate customers if they call too often.

Congress did not define exactly what constitutes a local call. It merely recognized that the Commission should consider exempting them from a national do-not-call list. Calls that are placed to set up a face-to-face transaction are inherently local; there must be a business presence in the area in order to make in-person meetings possible. The Commission should exempt calls made to set up a face-to-face meeting from a national list if it creates such a list. Local companies will still be subject to the company-specific requirements currently in place. If an individual chooses not to receive calls from a local business, he or she can simply ask to be placed on the company-specific list.

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COMMENTS OF AMERIQUEST MORTGAGE COMPANY

Ameriquest Mortgage Company (“Ameriquest”), by its attorneys, hereby submits these comments in the above-referenced Notice of Proposed Rulemaking (“NPRM”)

I. INTRODUCTION

A. Overview of Ameriquest and Its Industry

Ameriquest is a residential mortgage lender headquartered in Orange, California with nearly three thousand employees, two hundred offices and does business in forty-seven states. The company focuses exclusively on a segment of the mortgage industry known as “retail specialty” mortgage services. These mortgages provide housing finance opportunities to homeowners who have been denied credit through the conventional home mortgage process.

These services enable homeowners who are generally ineligible to receive credit from traditional “A” credit-quality lenders to avail themselves of a variety of beneficial mortgage-related opportunities, such as avoiding foreclosure, consolidating high-interest rate credit card and other debt into lower-interest rate debt-consolidation loans, and obtaining “cash out” for home improvements, college tuition and other benefits.

Typically, these loans are consummated in a face-to-face “closing,” usually at a title company or similar setting. During this closing process, all of the loan

documentation materials and the terms of the loan are reviewed with the customer. Lastly, in accordance with the federal Truth in Lending Act, after most of Ameriquest's loan transactions are closed and all the applicable documentation is signed, the borrowers are given a three day cancellation period, during which they can cancel the transaction. This cancellation period is designed to ensure that consumers will have ample opportunity to consider whether they are satisfied with the terms of the transaction. . In fact, it is Ameriquest's policy to extend this cancellation period to 7 days,

The retail specialty mortgage market relies heavily on telemarketing to contact its customer base. Indeed, a large percentage of Ameriquest's customers learn about available refinancing opportunities through the company's telemarketing outreach efforts. Thus, absent telemarketing, many of our customers would not be aware that these types of refinancing options exist. Our customers are happy to be informed of Ameriquest's mortgage financing alternatives. The fact that customers involved in face-to-face transactions purchase products at least five times more often than general telemarketing customers (*i.e.* calls with no face-to-face follow-up), strongly suggests that these types of calls are welcome.²

B. Inherent Consumer Protections in the Practices of Ameriquest and the Retail Special Mortgage Industry Obviate the Need for a Do Not Call List for these Calls.

Telemarketing in the retail mortgage sector differs from general telemarketing in several significant respects. First, mortgage loans are sophisticated financial products covered by the myriad of state and federal regulations designed to protect consumer's financial rights. These regulations require a customer to complete the transaction in

¹ Certain types of loans, such as loans that fund the purchase of a home, are not subject this right of cancellation.

person. Thus, the initial telemarketing calls are merely an invitation to begin a process that is ultimately closed in a later face-to-face meeting (“face-to-face calls”), rather than a single call in which a business both contacts a customer and completes a sale.

Ameriquest’s initial consultation provides the customer with sufficient information to determine whether to take the next series of steps in arranging a face-to-face meeting where the loan is finalized. Because mortgage transactions cannot be finalized within the context of a single telemarketing call, there is little risk of deceptive or abusive telemarketing. Furthermore, these types of transactions are often protected by the three-day right to cancellation referenced above.

Second, in order to identify potential customers for the types of loan products offered by the retail specialty mortgage industry, the lenders must identify existing homeowners with imperfect credit histories. Consequently, these companies utilize sophisticated databases that allow for narrow targeting along specific criteria. Ameriquest utilizes these databases, along with list services, to first mail promotional materials to targeted lists of potential customers before following up with sales calls. Loan officers located in branch offices make individual calls to potential leads. Because the calls are made without the use of predictive, random, or sequential dialers, Ameriquest does not utilize practices that many consumers regard as particularly annoying, such as abandoning calls or keeping customers waiting for an operator to become available.

Third, the initial telemarketing telephone calls not only introduce the company’s mortgage products to consumers, but also allow the company to tailor financing options

Direct Sellers Assoc., “2001 Direct Selling Growth and Outlook Survey.”

and alternatives to meet each customer's needs. This interactive process enables consumers quickly and efficiently to receive useful customized information such as interest rate and monthly payment estimates – a prospect not possible with traditional forms of print, radio, or television advertising. During the entire process, from the initial outbound call to a potential customer to the in-person closing, the customer has contact with one person – the loan officer responsible for that customer's loan. This personalized contact is much less invasive than a situation where a customer is subjected to different callers or where a customer must contact a customer service department to obtain more information or assistance.

Ameriquest's historically low levels of consumer complaints illustrate the inherent legitimacy and consumer benefits of face-to-face telemarketing. Ameriquest's telemarketing consumer outreach is performed through the company's own loan officers, not third party call center employees. These loan officers are not only familiar with the diverse range of Ameriquest financial service products, they are also trained on the requirements of the Telephone Consumers Protection Act ("TCPA") and other related federal and state telemarketing laws.

The company maintains its own in-house suppression file and is compliant with every state-specific requirement to which it is subject including applicable statewide do-not-call ("DNC") lists. Prior to making a telemarketing sales call, the company checks the number against the requisite state list (if any), the company's own list (as required by the TCPA), and the Telephone Preference Service maintained by the Direct Marketing Association. Ameriquest's telemarketing practices have resulted in traditionally low

⁹ By predictive dialers, Ameriquest means a computerized system with more outbound lines than service representatives. By contrast, each loan officer initiates one call at a time for Ameriquest.

levels of complaints. Indeed, Ameriquest has found that only one to two percent of its customers ask to be placed on the company's DNC list.

Lastly, these telemarketing techniques help to minimize consumer costs.

Ameriquest estimates that originating loans through alternate advertising channels can be as much as six times as expensive as those originated through the use of telemarketing.

Thus, Ameriquest's telemarketing outreach practices provide by providing an effective method for retail specialty mortgage providers to reach targeted potential customers inexpensively, thereby reducing consumer costs as well as complaints.

II. THE COMMISSION SHOULD NOT CREATE A NATIONAL DO-NOT-CALL LIST.

A. A National-Not-Call List is Unconstitutional.

A national do-not-call list cannot withstand First Amendment scrutiny under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), and its progeny. A national list is both overly broad and does not advance the interest that the TCPA is designed to serve. Furthermore, the Commission has not developed a record that is sufficient to justify such a tremendous burden on commercial speech.

A national do-not-call list fails three of the four prongs of *Central Hudson's* framework. First, the speech in question is "lawful and not misleading," and therefore given First Amendment protection. Second, the "asserted governmental interest," however, is not "substantial." Even if it were, a national do-not-call list under the TCPA does not "directly advance the governmental interest asserted." Finally, a national do-not-call list is far "more extensive than is necessary to serve that interest." Moreover, as the U.S. Supreme Court has held:

The four parts of the *Central Hudson* test are not entirely discrete. **All** are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three.⁴

I. There is no substantial government interest involved.

The asserted governmental interest involved in the TCPA is “privacy.” The Congressional findings of the TCPA clarify the privacy interest involved. “Unrestricted telemarketing...can be an intrusive invasion of privacy and...[m]any consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.” Congress itself recognized that this interest is not absolute, as the TCPA requires that “[i]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be *balanced* in a way that protects the privacy of individuals and *permits legitimate telemarketing practices*.”⁶

The governmental interest asserted cannot be considered substantial. First, the interest involved is not clearly defined. The court in *U.S. West, Inc. v. FCC*,⁷ indicated that “the government cannot satisfy the second prong of the *Central Hudson* test by merely asserting a broad interest in privacy.”⁸ Rather, the government “must specify the particular notion of privacy and interest served.” Importantly, unlike a rational-basis review, *Central Hudson* does not permit a court to “supplant the precise interest put forward by” the government.⁹

⁴ *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 527 U.S. 173, 183-84 (1999).

⁵ Pub. L. No. 102-243, § 2.

⁶ *Id.* (emphasis added); see also *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1235 (10th Cir. 1999) (“Moreover, privacy is not an absolute good because it imposes real costs on society.”).

⁷ 182 F.3d 1224 (10th Cir. 1999).

⁸ *U.S. West*, 182 F.3d at 1234-35.

⁹ *Edenfield v. Fane*, 507 U.S. 761, 708 (1993).

Second, even if the interest asserted is limited to reducing “telephone solicitation” calls, there is no concrete evidence to demonstrate that consumers do not want to receive calls.’’ Last year, outbound telemarketing generated over \$200 billion in sales. If consumers really do not want to receive calls, they would not purchase so many goods and services from marketers. The miniscule number of complaints versus the total number of calls does not prove that a large number of people do not wish to receive calls (to the contrary, it suggests that most people do not object to calls). Therefore, there is simply not a substantial governmental interest to support this broad and sweeping restraint upon speech inherent in a national do-not-call list.

2. A national list would not directly advance a governmental interest.

Nor can the Commission “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’’ The Court has made clear that the “burden is not satisfied by mere speculation or conjecture.’’

The limits on the scope of a national do-not-call list generate two problems. First, the objective cannot be advanced to a “material degree” because so many calls, and categories of calls, are left untouched. By the literal terms of the TCPA, calls from charities, calls from political campaigns, and calls from businesses that are not for sales purposes (*e.g.*, surveys) are excluded from the reach of a national do-not call list.¹³ These excluded calls amount to a substantial portion of the calls that individuals receive.

¹⁰ *Central Hudson*, 447 U.S. at 464 (“[T]he regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.”).

¹¹ *Edenfield*, 507 U.S. at 771

¹² *Id.* at 770.

¹³ Although the FTC’s proposed list has even more jurisdictional holes that make it impossible to materially advance the government’s interest, the limits of the FCC’s authority are also too circumscribed to advance the government’s interest.

Second, Congress's choice of one type of call over another to advance its goal does not survive First Amendment scrutiny.¹⁴ Subjecting only "telephone solicitation" calls to a national do-not-call list instead of all calls "place[s] too much importance on the distinction between commercial and noncommercial speech."¹⁵ Congress has chosen to limit the number of calls that individuals receive by placing restrictions only on telephone solicitation calls, but not on calls for political purposes or calls from nonprofit, charitable entities. Congress apparently realized that such calls are afforded the highest First Amendment protection and that restrictions on these calls would likely be constitutionally infirm. Yet, Congress is not free to choose to limit the total number of calls by singling out only one type of call based on the content of the call – even if the choice itself may be mandated by the constitution.

Such a method of limiting calls based on the type of call is much like the city ordinance struck down in *City of Cincinnati v. Discovery Network, Inc.*¹⁶ Cincinnati attempted to reduce sidewalk clutter by banning news racks that contained "commercial handbills." Cincinnati recognized that it could not lawfully ban newspaper racks containing traditional newspapers because of the First Amendment protection afforded the press. Cincinnati's choice (no matter that it was a constitutionally necessary choice), however, made a "distinction that bears no relationship *whatsoever* to the particular interests" it had asserted." So too, the distinction that Congress made between telephone solicitation calls and other types of calls bears no relationship to the goal of reducing unwanted telephone calls.

¹⁴ See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

¹⁵ *Id.* at 424.

¹⁶ 507 U.S. 410 (1993)

¹⁷ *Id.*

Just as the Supreme Court held that Cincinnati could not try to eliminate a problem by favoring one type of speech over another, the Commission cannot eliminate some telephone calls while protecting others. Because the Commission cannot statutorily reach calls that are not telephone solicitations, any national list that it creates under the TCPA will therefore violate the Constitution.¹⁸ The *Discovery Network* Court went on to explain that:

[T]he city's primary concern, as argued to us, is with the aggregate number of newsracks on its streets. On that score, however, all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault. In fact, the newspapers are arguably the greater culprit because of their superior number.¹⁹

Therefore, the Court held that there was not a reasonable fit between the means chosen and the ends sought.

Similarly, all calls, whether in connection with "telephone" solicitations" or not, are equally invasive. Some consumers might even argue that a call from a politician to raise money for his or her campaign, or a nonprofit seeking a donation, is more annoying and invasive (and less beneficial) than calls from companies like Ameriquest.

Furthermore, the TCPA distinguishes among speakers that convey *the same message*

The TCPA would allow a call by a nonprofit that is selling an item for fundraising purposes, but not a call by a for-profit entity that is selling the same good in order to make money

¹⁸ The Court has made clear that speech restrictions should be evaluated in the "context of the entire regulatory scheme." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 193 (1999). The Commission can only create a national do-not-call list for telephone solicitations. Simply because the Commission can only reach certain calls does not immunize a list from not directly advancing the overall interests involved (reducing telemarketing calls). See also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995).

¹⁹ *Discovery Network*, 507 U.S. at 426.

The Supreme Court has refused to allow the government **to** choose among speakers of the same message.²⁰ “Even under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.”” Thus, the distinction that the TCPA creates between speakers conveying an identical message cannot stand

3. A national list is more extensive than necessary.

Although the Commission need not demonstrate that a national DNC list is the absolute least restrictive means of limiting calls, the presence of other alternatives shows that it is not sufficiently tailored. The existing company-specific regime, the potential for caller-ID, and regulations on predictive dialers, as well as the availability of effective and inexpensive technologies all provide protections for consumers without blocking marketers’ First Amendment interests.

The Commission could also increase its own efforts to promote awareness of existing telemarketing regulations. Additional information and caller-ID are both examples of *more* rather than less speech resolving a perceived problem.²² The current company-specific rules do not run afoul of the First Amendment because even though certain calls are excluded, the rules do not create a blanket prohibition on calls *to* people on a national list. Rather, they are narrowly tailored to allow people to prevent calls from specific callers from which they do not wish to receive calls. The governmental interest

²⁰ *Greater New Orleans Broadcasting*, 527 U.S. at 193-94 (1999) (refusing to allow the government to ban advertising for private casinos but not Indian casinos).

Id.

²² *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (importing Justice Brandeis’s mandate that “the remedy to be applied is more speech, not enforced silence” into the commercial speech doctrine).

is directly advanced because consumers define which calls are annoying to them and then opt-out.

As the Court has made clear, the four prongs of *Central Hudson* overlap to a great extent. The fact that a national list fails all three prongs is further proof that a list cannot withstand First Amendment scrutiny.

B. The Commission Cannot Demonstrate that a National Do-Not-Call List is Needed.

Under *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983), “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” In 1993, the Commission determined that it should not adopt a do-not-call list because of the tremendous cost, burden, and minimal benefit to consumers. Aside from recounting the number of complaints that the Commission has received, there is no evidence that anything has changed. The number of complaints is not sufficient to justify reversing the earlier decision. Ameriquest fully supports the comments of the Direct Marketing Association, of which it is a member, on this point.

III. IF THE COMMISSION DECIDES TO IMPLEMENT A NATIONAL DATABASE, IT SHOULD BALANCE THE NEEDS OF MARKETERS AND CONSUMERS.

As Ameriquest has indicated, there are serious constitutional and policy concerns that should preclude the Commission from creating a national do-not-call list. Nonetheless, if the Commission decides to adopt a national do-not-call list, it should properly balance the needs of consumers with the needs of callers.²³ To that end, the Commission should, at a minimum, exempt calls made for the purpose of establishing face-to-face meetings (“face-to-face calls”). Additionally, if the Commission decides to create a national do-not-call list, and particularly if the Federal Trade Commission creates a list, the Commission should exercise its broad preemptive authority to simplify the regulatory framework and apply it uniformly across all segments of industry.

A. If the Commission Decides to Implement a National Database, It Should Exempt Calls Made merely to Schedule Face-to-Face Meetings.

As described in Part I, calls made to individuals for transactions that **will** be closed in a face-to-face meeting are much different from traditional telemarketing calls. For a number of reasons, such calls should be exempt from any national do-not-call requirements

1. The TCPA explicitly grants the Commission the authority to exempt local calls.

Even if face-to-face calls fit within the definition of a telephone solicitation because they “encourage” – but do not directly involve – the purchase of a good or service, the Commission is explicitly granted authority to exempt such calls from a

²³ See, e.g., TCPA, Pub. L. No. 102-243, § 2(9) (“Individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a **way** that protects the privacy of individuals and permits legitimate telemarketing practices.”).

national do-not-call list. The TCPA requires the Commission to “consider whether different methods and procedures may apply for local telephone solicitations.”” Face-to-face calls, as discussed below, are precisely the type of local call that Congress had in mind.

In considering an earlier Senate bill that contained this same language, Senator Pressler, the sponsor of the legislation, confirmed then-Senator Gore’s understanding that this provision extended not only to small businesses, but to all “companies that conduct business locally.”²⁴ Senator Gore specifically asked whether a photo studio such as Olan Mills, which has branches all over the country, but that markets locally, would, in fact, be considered a local company. Senator Pressler confirmed that he envisioned such businesses would be covered by a local business provision.

The business model of Anierquest is similar to other companies that establish face-to-face meetings. It makes calls from local offices and then closes its sale in a face-to-face setting, much like Olan Mills. This is in contrast to a centralized telemarketer that finalizes its transaction during the initial sales call, often from an unknown location hundreds or even thousands of miles away.

2. Face-to-face calls are inherently local.

The TCPA requires the Commission to consider alternatives to a national do-not-call list for businesses that conduct local calls. Calls made to establish face-to-face meetings are generally local calls. Because such calls are made solely to set up meetings, the company must have some presence in relatively close proximity to the consumer.

²⁴ 47 U.S.C. § 227(c)(1)(C).

²⁵ 137 Cong. Rec. S16,204 (daily ed. Nov. 7, 1991)

Typically, the calls are made from the location where the person conducting the meeting is located or in another nearby setting. Ameriquest offers a good example. It has 200 offices spread over a number of states. Those individuals who will conduct the face-to-face meeting generally make calls to consumers from offices near the consumer. Thus, even though Ameriquest is a national company, the calls that Ameriquest makes are local calls.

3. The Commission should exempt such calls because they are less intrusive than other calls.

Calls where the ultimate transaction is not completed during the call are generally considered to be less intrusive to consumers than calls made to consummate a sale over the phone. In a typical telemarketing transaction, telemarketers will attempt to both introduce a product and/or service and close the deal in a single call. As part of this process, it is common for the telemarketer to obtain the consumer's credit card or other financial information that will allow the telemarketer to complete the purchase. This approach can be highly intrusive.

Unlike the typical telemarketer whose goal is to sell the product or service upon completion of the call, the goal of Ameriquest is to begin a process that is ultimately closed in a face-to-face transaction.

In his colloquy with Senator Pressler, Senator Gore noted that businesses conducting local calls, "are subject to the scrutiny of the community, and must live by their reputation in the community, regardless of the type of business they conduct."²⁶ In other words, unlike national telemarketers that do not have a presence in a locality,

²⁶ 137 Cong. Rec. S16,204

businesses that make local calls have a connection to the community. This is particularly true where the call is made to merely initiate the start of a process concluded in-person at a later time. Such meetings require a business to have a physical presence in the community and therefore there are additional incentives for such calls to be limited and targeted. Otherwise, the business risks alienating consumers in that locality.

4. A National DNC Without a Face-to-Face Exemption Would Unduly Penalize Ameriquest Consumers.

Ameriquest originates 1000s of loans each month. Since the company obtains a large percentage of its revenues through its telemarketing outreach efforts, a DNC requirement could result in many homeowners not being made aware of refinancing opportunities offered by Ameriquest. While the company understands the Commission's desire to reduce perceived intrusions in consumer privacy, if the rule is drafted in too broad a fashion, it could have significant impact on the special retail mortgage industry, thereby substantially limiting consumer choice

5. The proper means of regulating local calls is the company specific do-not-call list.

Rather than subject face-to-face calls to a national do-not-call list, the Commission should simply retain the existing company specific requirement of the TCPA. There are fewer face-to-face calls than other types of telemarketing calls, and therefore, it is easy for consumers to opt-out of such calls on a company-by-company basis. The volume of calls affected by such an exemption would be insignificant compared to the overall number of telemarketing calls that would be subject to a nationwide DNC list. Also, because calls of this nature are more efficient, *i.e.* a relatively high percentage of initial calls ultimately result in a sale, each call affects a relatively larger amount of commerce than does a typical telemarketing call. Since consumers find

calls that result in face-to-face sales to be less intrusive than typical telemarketing calls, subjecting face-to-face calls is both unnecessary and unduly burdens commerce

B. The Commission Should Broadly Preempt State Law and Cover All Industries.

As the Commission is aware, the Federal Trade Commission has proposed creating a national do-not-call list as part of the Telemarketing Sales Rule. There are many problems with the FTC's proposal, but two issues in particular arise from the FTC's proposal that the Commission could remedy. First, the FTC's limited jurisdiction will directly limit Ameriquest's telephone marketing but not the marketing of its competitors. Second, the FTC's lack of intrastate authority will result in one more list for marketers; this Commission can create a single national list applicable to all calls.

1. If the FTC creates a national list, the FCC must remedy the jurisdictional gaps.

Under the Telemarketing and Consumer Fraud and Abuse Prevention Act, the FTC is not granted the authority to regulate several types of institutions, including depository institutions such as banks and savings and loan associations. Therefore, to the extent that the FTC creates a national list, depository institutions *would not* be subjected to the list. Although Ameriquest is a financial services provider, it is not a depository institution. Because Ameriquest is not a depository institution, *ipso facto*, it *would* be subject to an FTC list. Selecting one *segment* of an industry — non-depository financial services providers — for regulation, while leaving another segment — depository institutions, such as banks — unfettered, is fundamentally unfair and would result in significant competitive imbalances, even more so than selecting certain industries rather

than others. If the FTC does create a national list, the Commission must create a single national list that is applicable to all companies

2. If the FTC creates a national list, the FCC should create a broadly preemptive national list.

The FTC has jurisdiction over only interstate calls.²⁷ This limited reach will allow the 28 states that have state lists to retain those lists. With an FTC-mandated list, marketers would then be forced to purchase and utilize 29 different lists (or more) in a variety of formats, with different update times. This Commission, on the other hand, has the authority to create a single national list that preempts all state lists. Ameriquest supports the Direct Marketing Association's comments on the scope of the Commission's preemptive authority.

Although Ameriquest does not believe that a national do-not-call list is needed or even constitutional, the Commission can certainly create a more workable list that properly balances consumer and marketer interests. Such a list would include, *inter alia*, an exemption for face-to-face calls and would preempt state lists

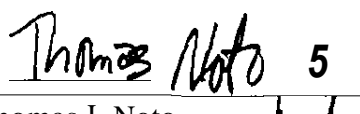
²⁷ 15 U.S.C. § 6106(4)

IV. CONCLUSION

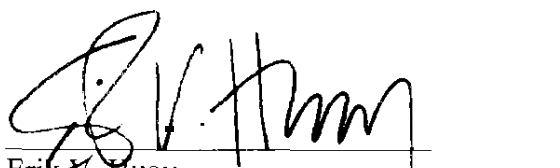
For the forgoing reasons, Ameriquest does not believe that the Commission should adopt a national do-not-call list. Should it endeavor to do so, however, it must balance the needs of marketers and consumers to provide an exemption for calls made to set up a race-to-race meeting.

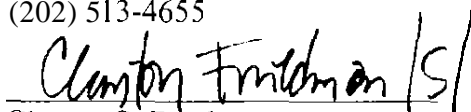
Respectfully submitted,

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